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## **OLR Bill Analysis**

### **sSB 1164**

#### ***AN ACT CONCERNING REVISIONS TO STATUTES CONCERNING HUMAN RIGHTS AND OPPORTUNITIES.***

##### **SUMMARY:**

This bill makes numerous changes throughout the Commission on Human Rights and Opportunities (CHRO) statutes and other anti-discrimination laws.

The bill provides that the right to bring a complaint alleging discrimination applies not only to people who claim to have been injured by a discriminatory practice but to those who believe they will be injured by such a practice about to occur. It makes several other changes affecting the process of filing complaints with CHRO, such as expanding the types of violations for which people can file complaints.

It makes certain changes concerning discrimination based on sexual orientation, such as specifically prohibiting harassment on that basis in the workplace. It also prohibits employers from permitting sexual harassment.

The bill makes other changes in anti-discrimination laws. For example, it adds to the class of people protected by various laws, such as those prohibiting deprivation of rights (§ 7) and housing discrimination (§ 15). It apparently removes the prohibition on employment discrimination due to past history of mental disability.

The bill transfers, from CHRO's executive director to the governor, the authority to designate the chief human rights referee. It makes various clarifications and changes regarding the role of CHRO's commissioners and staff.

The bill makes changes in the procedure for CHRO to enforce compliance with certain anti-discrimination laws and affirmative

action requirements for state and public works contractors.

The bill also makes numerous minor, technical, and conforming changes.

EFFECTIVE DATE: July 1, 2013

### **DISCRIMINATION BASED ON SEXUAL ORIENTATION**

The bill changes the definition of “sexual orientation” for purposes of the anti-discrimination laws and related provisions. The current definition excludes any behavior that constitutes a violation of the sexual offense statutes (including sexual assault, prostitution, and related crimes). The bill eliminates this exclusion (§§ 2, 63). The legal effect of this change is unclear.

Currently, the prohibitions on discrimination based on sexual orientation are codified in separate statutes from other anti-discrimination statutes. The bill repeals these separate sexual orientation statutes and folds their provisions into the other statutes. In doing so, the bill makes the following substantive changes.

The bill adds sexual orientation to the grounds on which employers, employment agencies, labor organizations, or their agents are prohibited from harassing an employee, person seeking employment, or member, respectively. The current grounds include sex and gender identity or expression. The bill also prohibits employers or such other persons noted above from permitting sexual harassment on these grounds (§ 10).

It adds the requirement that state contractors agree to take affirmative action to ensure that applicants with job-related qualifications are employed without regard to their sexual orientation (§ 11).

Currently, the provisions on housing discrimination on the basis of sexual orientation do not apply to (1) renting a room or rooms in a dwelling if the owner actually maintains and occupies part of the unit as a residence and (2) a unit in a dwelling with not more than four

units if the owner actually maintains and occupies one of the other units as a residence. Under the bill, this exception in (1) applies only to single-family dwelling units. The exception in (2) applies only to dwellings that house no more than two families (§ 15).

### **§§ 10, 63 — EMPLOYMENT DISCRIMINATION**

Various provisions in current law prohibit employment discrimination based on someone's "present or past history" of mental disability. The bill eliminates this clause. Thus, it appears to remove the prohibition on discriminating against someone due to past history of mental disability, for people who no longer have such a disability.

The bill repeals a prohibition on using numerical goals, quotas, or other types of affirmative action programs in the administration or enforcement of the employment discrimination statutes in regards to discrimination based on mental disability. Case law prohibits the use of quotas in affirmative action programs.

The bill repeals a provision that provides that no provision of certain CHRO statutes, including those prohibiting employment discrimination, may be construed to void or supersede the provisions of a separate labor statute that forbids discrimination in pay on the basis of sex.

### **§ 14 — PUBLIC ACCOMMODATIONS DISCRIMINATION**

The current statute on discrimination in public accommodations has several references to guide dogs for blind, deaf, or mobility impaired people. The bill adds references to other disabled people in these provisions.

Current law specifies that the provisions on public accommodations discrimination based on physical disability do not require anyone to modify his or her property or provide a higher degree of care for a physically disabled person. The bill provides that this exception applies unless other state laws or federal law would require such actions. The federal Americans with Disabilities Act generally requires places of public accommodation to be accessible to people with

physical disabilities.

## **§ 15 — HOUSING DISCRIMINATION**

The bill makes additions to the class of persons protected by housing discrimination laws. Table 1 below describes such changes. By law, a violation of these provisions is a class D felony.

**Table 1: Addition to Classes Protected by Housing Discrimination Statutes**

<b><i>Protected classes added</i></b>	<b><i>Provisions (the law prohibits these actions when based on a person being a member of the protected class)</i></b>
Mental, intellectual, learning, or physical disability	<ul style="list-style-type: none"> <li>• Refusing to sell or rent after a person makes a bona fide offer, or refusing to negotiate for the sale or rental of a dwelling, or otherwise denying or making a dwelling unavailable</li> <li>• Discriminating in the terms, conditions, or privileges of a dwelling's sale or rental, or in the provision of related services or facilities</li> </ul>

## **OTHER CHANGES TO DISCRIMINATORY PRACTICES**

### **§§ 2, 7 — Marital Status**

The bill defines “marital status” for purposes of the anti-discrimination statutes. Under the bill, the term refers to being single; married as recognized by the state; widowed; separated; or divorced. Among a number of other new classes, it prohibits the deprivation of rights based on marital status (see below). The law already prohibits various types of discrimination on this basis.

### **§§ 2, 13 — Physical and Mental Disability**

The bill specifies that all references to physical disability in the anti-discrimination statutes include blindness. It does so by adding blindness to the non-exclusive list of conditions included within the statutory definition of “physical disability.” Currently, many, but not all, anti-discrimination statutes that reference physical disability specifically include blindness.

It also applies the definitions of physical and mental disability in the CHRO statutes to the state set-aside program statute. (The set-aside program, also referred to as the supplier diversity program, requires state agencies to set aside some contracts for bidding exclusively by

small businesses, including some exclusively for bidding by businesses owned by women, racial minority groups, disabled individuals, or nonprofit organizations.)

### **§§ 9-10 — *Retaliation or Aiding and Abetting***

Current law prohibits anyone from:

1. discriminating against someone (e.g., firing someone) because he or she opposed a discriminatory employment practice, brought a complaint, or testified or assisted someone else in a complaint proceeding or
2. aiding, abetting, inciting, compelling, or coercing someone to commit a discriminatory employment practice or attempting to do so.

The bill extends these provisions to such actions involving any type of discriminatory practice, not just employment discrimination. It includes retaliation within the prohibition in (1) above. It limits the application of the prohibition under (1) to entities, a term the bill does not define but which may not include individuals.

### ***Other Additions to Protected Classes***

The bill makes several other additions to the classes of people protected by various anti-discrimination laws. Table 2 describes such changes. The table also indicates any specific penalties that apply. (Some anti-discrimination laws set out specific penalties in addition to the general remedies available for discriminatory practices through the CHRO complaint process or the courts.)

**Table 2: Addition to Classes Protected by Other Discrimination Statutes**

<b><i>Protected classes added (§)</i></b>	<b><i>Provisions</i></b>
Age, marital status, and mental, intellectual, and learning disability (§ 7)	Prohibits depriving someone of rights, privileges, or immunities secured or protected by Connecticut or federal laws or constitutions, or cause such a deprivation, because of protected status; this includes placing noose or simulation of one with intent to intimidate or harass (a violation is a class A misdemeanor, or a class D felony if the violation leads to more than \$1,000 of property damage)

	This change specifically allows CHRO to enforce federal discrimination laws on these bases, when applicable
Age, marital status, ancestry, and mental, intellectual, learning, and physical disability (§ 8)	Prohibits professional, trade, or occupational organization whose profession, trade, or occupation requires a state license, from denying membership to person because of protected status (penalized by \$100 to \$500 fine)
Learning disability (§ 11)	Sets anti-discrimination requirements for state contracts and contracts with political subdivisions other than municipalities. Under these provisions, the contractor must generally agree (1) that in the performance of the contract it will not discriminate or permit discrimination in any manner prohibited by state or federal law and (2) to take affirmative action to ensure that applicants with job-related qualifications are employed and that employees are not discriminated against.
Learning disability (§ 14)	Prohibits anyone from denying someone, based on his or her protected status, full and equal accommodations in any public establishment, subject to lawful conditions and limitations that apply alike to all people (a violation is a class D misdemeanor)
Age, sex, gender identity or expression, sexual orientation, marital status, present or past history of mental disability, and intellectual, learning, or physical disability (§ 50)	Prohibits using an advertisement to ridicule someone or hold a person or class of people up to contempt (a violation is a class D misdemeanor)

## CHRO

### §§ 3-6, 36-38 — *General Allocation of Responsibility Within CHRO*

By law, CHRO is overseen by nine commissioners, who serve part-time. (Five are appointed by the governor and four by legislative leaders, with the General Assembly’s advice and consent.) The bill refers to the commissioners as the board of commissioners. It refers to the commission, unless the context clearly indicates otherwise, as CHRO’s professional staff or its executive director or the director’s designee lawfully exercising the powers and duties the law vests in the commission. (For this purpose, the discussion below generally refers to “CHRO” or “the commission” interchangeably.)

The bill makes several changes clarifying the role of the commissioners and the commission. For example, it clarifies that the commissioners, and not CHRO staff, appoint and supervise CHRO’s executive director. It requires CHRO to consult with the board of commissioners when exercising its authority to adopt, amend, or rescind regulations.

Among other things, it specifies that CHRO, and not an individual commissioner, has the authority to bring a petition for equitable relief, such as a temporary restraining order, in employment discrimination matters. It also allows such petitions to be made in Hartford Superior Court, even if that is not the district where the respondent resides or where the alleged discrimination occurred.

By law, there are three human rights referees at CHRO, appointed by the governor with the General Assembly's advice and consent. One of them serves as the chief human rights referee. The bill requires the governor, rather than CHRO's executive director, to designate the chief referee. It also refers to "chief referee" rather than "chief human rights referee."

#### **§§ 4, 5 — CHRO Authority and Responsibility**

The bill codifies current practice by specifically referencing a legal division as one of the allowable divisions within CHRO. It broadens the circumstances under which CHRO can accept voluntary or free services, by removing any conditions for accepting such services.

The bill eliminates the requirement for CHRO to annually report certain matters to the governor, instead requiring the reporting but not setting a reporting schedule. These matters include (1) CHRO's recommendations concerning removing injustices and other matters it deems advisable and (2) descriptions of CHRO's work, including its investigations, proceedings, and hearings, their outcomes, and CHRO's decisions. Under both current law and the bill, different provisions require CHRO to annually report certain information to the governor, such as information on cases from the previous year that exceeded statutory time frames and recommendations for necessary legislation for CHRO to meet those time frames (see § 30, CGS § 46a-82e (b)).

#### **§ 5 — Contract Compliance**

By law, CHRO can issue a discrimination complaint against a contractor or subcontractor if it determines through its monitoring and compliance process that the contractor has not complied with specified

anti-discrimination laws and contract provisions in state and public works contracts (e.g., affirmative action requirements). In this situation, if the presiding officer makes a finding of noncompliance after a hearing, he or she can take a range of specified actions. The bill requires the presiding officer to order the relief needed to achieve full compliance with such laws and contract provisions.

The bill also makes changes to some of the existing authority the presiding officer has in regards to such noncompliance. Currently, the officer can order the state to retain 2% of the total contract price per month on any existing contract with the noncomplying contractor. The bill specifies that the 2% refers to the amount the state must withhold until CHRO approves the contractor's affirmative action plan for public works contractors. In the case of noncomplying contractors, the bill also requires this amount to be deposited in the same fund as are penalties collected for certain fraudulent acts related to qualification as a minority business enterprise (see below).

Currently, a presiding officer can notify the attorney general when there is a substantial or material violation or the threat of such a violation of the required anti-discrimination provisions in contracts. The bill allows such notice only for substantial violations or the threat of them. Similarly, the bill only allows the presiding officer to recommend to a contracting agency that the agency declare a contractor to be in breach of contract for substantial violations, not just material violations, still occurring after a specified period of time.

The bill allows the presiding officer to recommend to the Equal Employment Opportunity Commission or the Department of Justice that appropriate proceedings be instituted under related laws to Title VII of the 1964 Civil Rights Act, in addition to Title VII itself, when necessary.

The bill specifies that the presiding officer can order more than one of the range of remedies, or other relief designed to achieve full compliance with anti-discrimination statutes and required contract provisions. It also specifies that the board of commissioners, and not



CHRO generally, has the authority, when the board deems it in the state's best interests, to exempt a contractor from complying with certain nondiscrimination and affirmative action requirements related to state and public works contracts. (The bill also clarifies that subcontractors can be exempted in this manner.)

### **§ 5 — *Fraud Related to Qualification as Minority Business Enterprise***

Currently, CHRO can assess a civil penalty of up to \$10,000 if it determines through its complaint procedure and following a hearing that a contractor, subcontractor, or supplier has (1) fraudulently qualified as a minority business enterprise or (2) performed services or supplied material on behalf of another contractor, subcontractor, or supplier, knowing it has fraudulently qualified and that the supplies or material will be used for a set-aside contract.

The bill extends these provisions to service providers. It also allows CHRO to issue such a complaint if it discovers such a violation through its monitoring and compliance process, instead of through its complaint process. As under current law, a penalty can be assessed only after a hearing.

### **§ 6 — *Expert Witnesses***

By law, presiding officers at CHRO hearings have the authority to determine reasonable fees to be paid to expert witnesses. Unlike current law, the bill requires a dentist, registered nurse, or real estate appraiser to be licensed in Connecticut to qualify as an expert witness.

### **§§ 18, 61-62 — *Affirmative Action Plans***

The bill specifies that the board of commissioners, rather than CHRO generally, (1) approves affirmative action plans submitted by state agencies, departments, boards, and commissions and (2) issues certificates of noncompliance if the board disapproves such a plan. By law, this certificate bars the state entity from hiring or promoting someone to fill a position unless certain determinations are made.

The bill makes other changes clarifying that the board of

commissioners, as well as CHRO staff, have a role following the issuance of such a certificate. It also provides that the chief referee, rather than the commission chairperson, appoints a presiding officer if the state entity requests a hearing to challenge the certificate.

### **DISCRIMINATORY PRACTICE COMPLAINT PROCEDURE**

The bill allows someone to bring a complaint with CHRO even if the person has not yet been injured by a discriminatory practice, if the person believes he or she will be injured by such a practice about to occur (§ 2). It is unclear how imminent the alleged discriminatory practice must be.

The bill makes several changes to the process of filing complaints with CHRO for alleged discriminatory practices.

#### **§ 29 — General Provisions**

Current law generally allows people claiming to be aggrieved by alleged discriminatory practices to file complaints with CHRO. But complaints alleging certain violations can only be initiated by CHRO itself and not someone claiming to be aggrieved. These include violations of the state set-aside program, affirmative action plans by state entities, and affirmative action plans and related requirements for public works contractors. The bill allows people aggrieved by alleged violations of these provisions to also file complaints directly.

The bill exempts complaints alleging housing discrimination from the general requirement that CHRO complaints be filed under oath.

Current law allows the commission itself to issue complaints in various circumstances. The bill specifies that CHRO's legal counsel has this authority. By law, CHRO may employ attorneys licensed in this state to perform certain duties and responsibilities.

The bill eliminates the requirement that complaints alleging discrimination based on denial of state employment or occupational licensure due to criminal history be filed within 30 days after the alleged discrimination. It subjects such complaints to the same time frame as other complaints—within 180 days after the alleged

discrimination.

**§ 30 — Complaints Pending More Than Two Years**

By law, if a discrimination complaint has been pending for more than two years, and the CHRO investigator fails within the ordered time frame to issue a reasonable cause finding (i.e., to determine whether there is reasonable cause that discrimination occurred), the complainant or respondent can petition the Hartford Superior Court for an order requiring the commission to issue a finding by a specified date. The petition must be served on the commission and all persons named in the complaint by mail, return receipt requested.

The bill eliminates the option of serving the petition on CHRO's legal counsel, instead requiring it to be served on the executive director. The bill also provides that if return receipts are not available when the petitioner files the required affidavit, the petitioner must file them with the court immediately after receiving them.

By law, the court must hold a hearing on such a petition that is contested. Current law generally requires the court to award court costs and attorneys' fees (up to \$500) to the petitioner unless CHRO shows good cause for not issuing a finding within two years of the complaint filing or the date the executive director ordered the investigator to issue a finding, whichever is later. The bill makes the award discretionary, and allows the court to order it unless CHRO shows good cause for not issuing the finding by the date ordered by the executive director. (Under current law and the bill, certain parties are not allowed to recover such costs.)

**§ 31 — Procedure After Complaint is Filed**

The bill eliminates the requirement for a respondent to show good cause to be granted an extension to file a written answer to a complaint. It requires a respondent to file a response to any CHRO request for information within the same timeframe and subject to the same conditions as apply to the answer (i.e., under oath and generally within 30 days).

Under the bill, a complaint sent by first class mail is deemed to be received two business days after it was mailed, unless the respondent proves otherwise. It also treats amendments to complaints the same way as complaints for purposes of these provisions.

**§ 31 — Merit Assessment Review (MAR) and Legal Review of Complaints Dismissed After MAR**

By law, a mandatory mediation conference must generally be held if a discrimination complaint is (1) not dismissed after the executive director's merit assessment review of the case file or (2) dismissed but then reinstated following legal review by CHRO's counsel. The bill eliminates the option for this mediation conference to be scheduled to coincide with the investigator's fact-finding conference.

**§ 31 — Early Legal Intervention and Reasonable Cause Investigation**

By law, either party in a discrimination complaint or CHRO can request early legal intervention for complaints that are not resolved after the mandatory mediation conference. The bill specifies that the executive director or his or her designee can administratively dismiss the complaint at this stage, in addition to the other current options.

**§ 31 — Request for Reconsideration**

The bill eliminates a complainant's ability to request reconsideration of a dismissal for failing, without good cause, to attend a fact-finding conference after being notified of it. It instead allows reconsideration requests to be made for dismissals:

1. for the complainant's failure to attend a mandatory mediation conference without good cause;
2. when the respondent has eliminated the discriminatory practice identified in the complaint, taken steps to prevent a similar future occurrence, and offered the complainant full relief, even though the complainant refused it; or
3. entered administratively after a request for early legal intervention (see above).

**§ 31 — Order of Default Against Respondent**

The bill allows respondents to apply for relief when the executive director or designee enters an order of default against a respondent.

**§ 32 — Certification of Complaint**

By law, if a CHRO investigator who finds reasonable cause to believe that discrimination occurred fails to eliminate it, by conference, conciliation, or persuasion, within 50 days after the finding, the investigator must certify the complaint and results of the investigation within 10 days after the 50-day period. The bill specifies that the investigator's conclusion that conciliation has failed is conclusive on this issue.

After a complaint is certified, or after CHRO brings a complaint against a contractor for certain types of violations, the law requires the chief referee to appoint a hearing officer or referee to act as presiding officer to hear the complaint or conduct settlement negotiations. The bill requires the chief referee to appoint a hearing officer or referee to also preside over the complaint following early legal intervention decisions.

The bill allows the parties to all agree to a venue outside of CHRO's office for a hearing or settlement conference. Currently CHRO decides where the hearing or conference takes place. The bill also authorizes the chief referee to appoint a referee or volunteer attorney to conduct settlement negotiations.

By law, the attorney general or CHRO legal counsel can withdraw the certification of a complaint and remand the case to the investigator upon determining that a material mistake of law or fact was made in the reasonable cause finding. In this situation, the bill requires the investigator to complete any required action within 90 days after receiving the file.

It allows a settlement officer to enter a default, and order necessary relief, if the respondent fails to appear at the settlement conference after receiving proper notice.

**§ 33 — Determination After Hearing**

The bill specifically requires CHRO presiding officers, after conducting hearings, to (1) make written findings of fact and (2) when the officer determines that discrimination occurred, take necessary actions to make the complainant whole.

**§§ 31, 34-35 — Subpoenas and Interrogatories**

The bill specifies that it is CHRO's legal counsel who has the authority to issue subpoenas as part of CHRO investigations.

It allows a contempt proceeding for refusal to obey a subpoena issued under the CHRO laws to be brought in Hartford Superior Court or the judicial district where the investigation was conducted, in addition to the venues currently allowed (e.g., the district where the hearing was held). It also allows a proceeding to order compliance with CHRO-issued interrogatories to be brought in Hartford Superior Court, in addition to the current venues.

In both types of proceedings, the bill prohibits a party from raising, or the court from considering, an objection not raised before CHRO. For proceedings concerning interrogatories, the bill requires, rather than allows, the court to enter an appropriate order.

**§ 40 — Appeal or Reopening**

By law, CHRO or a complainant or respondent can appeal a presiding officer's final decision under the uniform administrative procedure act. It appears that in such appeals, the bill removes the court's authority to order temporary relief, such as a restraining order.

By law, a complainant or respondent can ask CHRO to reopen a case, by applying within two years of CHRO's final decision. The bill specifies that the application must be made to the executive director. It also prohibits such an application by a complainant who (1) has been granted a release from CHRO jurisdiction or (2) has not been granted a release but has filed a court case.

**§§ 46-49 — Civil Action After Release From CHRO Jurisdiction**

The bill allows someone who has obtained a release from CHRO jurisdiction to bring a court case in the district where he or she resides, in addition to those venues already allowed (e.g., the district where the discrimination allegedly occurred).

It specifically allows the CHRO executive director to designate to someone else his authority to grant a release from CHRO jurisdiction.

It also specifies that a complainant must serve a copy of the complaint in such an action on the executive director, rather than on CHRO.

#### **§ 42 — PENALTY FOR FAILURE TO POST CERTAIN NOTICES**

By law, CHRO can require anyone subject to the laws prohibiting public accommodations or housing discrimination to post notices describing those laws. CHRO can also require an employer with at least three employees to post, in a prominent and accessible location, information about the prohibition on sexual harassment and the remedies for victims. The bill subjects employers, employment agencies, and labor organizations that fail to post such notices to a fine of up to \$250.

#### **BACKGROUND**

##### ***Related Bill***

sSB 1153, reported favorably by the Judiciary Committee, (1) requires the Metropolitan District Commission (MDC) to participate in the state's set-aside program and (2) extends to MDC contracts various requirements for non-discrimination provisions that apply to state contracts.

#### **COMMITTEE ACTION**

Judiciary Committee

Joint Favorable Substitute

Yea 35      Nay 8      (04/19/2013)